United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

74-1100

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

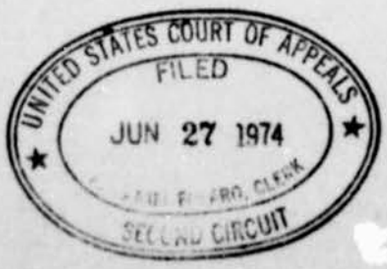
No. 74-1100

JOEL BREAKSTONE
Plaintiff-Appellant

vs.

JOHNSON STATE COLLEGE,
WILLIAM CRAIG, INDIVIDUALLY AND
AS PRESIDENT OF JOHNSON STATE COLLEGE,
RALPH MOTICELLO, INDIVIDUALLY
AND AS DEAN OF STUDENTS OF
JOHNSON STATE COLLEGE,
THEODORE BARNET, INDIVIDUALLY AND
AS STATE'S ATTORNEY FOR LAMOILLE COUNTY

PETITION FOR REHEARING IN BANC



Richard S. Kohn
American Civil Liberties
Union of Vermont, Inc.
43 State Street
Montpelier, Vermont

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Joel Breakstone
Plaintiff-Appellant,

v.

Johnson State College, William Craig, individually and as President of Johnson State College, Ralph Moticello, individually and as Dean of Students of Johnson State College, Theodore Barnet, individually and as State's Attorney for LaMoille County

Docket No.74-1100

PETITION FOR REHEARING IN BANC

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

JOEL BREAKSTONE, appellant herein, respectfully petitions this Court for a rehearing of its decision of June 13, 1974 in the above entitled case. The Court affirmed the Opinion and Judgment of the District Court from the bench under Local Rule Sec. 0.23. Appellant believes that the questions raised by his appeal are of exceptional importance and respectfully suggests that rehearing in banc would be appropriate.

STATEMENT OF FACTS

On December 10, 1970, a so-called "explosive device" was confiscated from the appellant's dormitory room. On December 14, he was told by Dr. Craig, President of Johnson State College, that if it turned out to be dangerous to persons or property, he would be expelled. The "device" was turned over to the state police for analysis. No word had been received when the college went on intercession on December 19, nor when classes resumed on January 18, 1971. Appellant was permitted to return for the Spring semester because no laboratory analysis had materialized.

In the meanwhile, the State's Attorney for LaMoille County wrote a series of letters to Dr. Craig urging that appellant be segregated or expelled. This correspondence culminated in a letter dated February 11 stating that the device had been determined to be harmful to persons or property if exploded. In a separate paragraph he advised Dr. Craig that in the opinion of his office, the appellant was "mentally ill." Pl. App. p.36.

On February 12, Dr. Craig expelled appellant from college. Although following the discovery of the "device" Dr. Craig had met informally with appellant for the purpose of determining his motivations, there was no formal due process hearing prior to expulsion.

On March 11, 1971, appellant commenced this action in United States District Court seeking damages and injunctive relief. At a hearing on his request for a TRO, the late Chief Judge Bernard Leddy strongly suggested that the appellant be given a hearing before the college court system with full procedural rights, including the right to be represented by counsel and to conduct cross-examination.

A hearing was held on March 19, 1971. The experts from the state police laboratory were cross-examined. On March 22 the college court ruled that even though the appellant was guilty of manufacturing an explosive device, it did not feel "that the manufacture of this particular explosive device constitutes a serious enough offense to result in academic dismissal." Exhibit 16. The college appellate court subsequently deleted any reference to "explosive device," substituting the term "potentially dangerous device." Exh.18.

Point 1

In Winnick v. Manning, 460 F.2d 545 (2d Cir. 1972) and, more recently, in Blanton v. State University of New York, 489 F.2d 377 (2d Cir. 1973), the Court has left open the question of when a college student faced with dismissal must be afforded the right of cross-examination. The charge against the appellant in this case was not only of an extremely

serious nature, but also it involved a technical subject,i.e., the harmful capabilities of an "explosive device." One can hardly imagine a more compelling situation for cross-examination.

Moreover, the involvement of the police and the State's Attorney required that the accused also be afforded the right to retained counsel. Appellant's reinstatement after a hearing with full procedural safeguards is stark evidence of the importance of these rights under the circumstances of this case.

Point 2

In Dale v. Hahn, 440 F.2d 633 (2d Cir. 1971), the Court held "that the defense of official immunity should be sparingly applied in suits brought under Section 1983." Id. at 637. The Court held a hospital administrator liable for actual damages where he was under no official compulsion to appoint a committee for a mental patient, where no statute precluded the safeguards which the plaintiff contended were constitutionally required, and where only compensatory damages were sought.

The District Court did not apply this standard in determining whether Dr. Craig was immune. Instead, it held that Craig had acted in good faith and was thereby insulated from liability. Pl.App. 21.

Recently, in Scheuer v. Rhodes, 94 S.Ct. 1683 (1974), the

Supreme Court held that executive officers, including college presidents, are not absolutely immune from liability for acts performed in the course of their duties. Whether an executive officer is protected by a qualified immunity depends upon "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with ggod faith belief." Id. at 1692. The Court emphasized that in emergencies, officials must often act swiftly and firmly, and in such situations are entitled to rely on traditional sources for the factual information on which they decide and act. Id. at 1691. This implies that in the absence of an emergency, an executive officer may be held to a stricter standard.

At the time Dr. Craig decided to expel the appellant there was no emergency. After all, it had been two months since the discovery of the "device." Dr. Craig was satisfied that appellant harbored no malicious motive, although he had demonstrated poor judgment. Pl. App. 11. Dr. Craig had told the appellant that he would be expelled if the device turned out to be dangerous to persons and property. There was no reason why a proper hearing could not have been held to enable the appellant to dispute the information conveyed by Barnet that the device was dangerous. In this context, it should be noted that no one had actually seen the police lab report,

which was not forthcoming until March 16.

Whether or not Dr. Craig was immune from liability to the appellant should be determined in the light of Dale v. Hahn, supra, and Scheuer v. Rhodes, supra.

Point 3

In his letter to Dr. Craig of February 11, Barnet stated that in the opinion of his office, the Appellant was mentally ill. The District Court found that this characterization was libelous per se. Although privilege was not raised as a defense, the District Court held that it had been tried by implied consent. The record shows that neither party was ever aware that privilege, as opposed to immunity, was being raised as a defense and, therefore, could not have been tried by implied consent. 3 J.Moore Federal Practice par. 15.13(2) at 991-992.

Point 4

The court held that the libelous statement made by Barnet "had no direct connection with any judicial proceeding pending or subsequently to be brought." Nevertheless, the court found that Barnet was absolutely immune because he had acted within the "outer perimeter" of his duties. This is directly at odds with the holding of the Vermont Supreme Court in Polidor v. Mahady, 130 Vt. 173, 287 A.2d 841 (1972), holding that a

prosecutor's immunity does not extend beyond judicial acts.

Point 5

The District Court gave no consideration at all to the questions of whether Barnet placed himself outside the privilege or whether it was extinguished by abuse. Barnet was largely motivated by his belief that the Appellant was in need of psychiatric help and he felt the statutes covering his offense were inadequate. (Tr. 256,257-58) A person protected by a privilege will lose it if he uses the occasion for an ulterior purpose.

The court found that Barnet had an "honest belief" (Pl.App. 29) "as to the reasons which motivated plaintiff to construct and attempt to detonate the explosive device." But honest belief is not sufficient if it is not a reasonable belief as well. III Restatement, Torts, Sec. 601; 594 at p.243 (1938). Appellant submits that the record is devoid of any evidence from which one could reasonably conclude that the plaintiff was insane.

Point 6

Finally, Barnet is not protected by conditional immunity because when he wrote the libelous letter he was not engaged

in judicial, quasi-judicial or investigative functions. The District Court held that his characterization was unrelated to any criminal prosecution pending or to be brought. See Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972) cert. denied 94 S.Ct. 894 (1974). In any event, the record is replete with evidence of malice, as that term has been defined in this context.

Conclusion

For all the reasons set forth above and in appellant's brief previously submitted and on file with this court, appellant's petition should be granted and the judgment and order appealed from should be reviewed by this court sitting in banc.

Dated: June 25, 1974

Respectfully submitted,

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Attorney for the Appellant,
Joel Breakstone

I hereby certify that I have examined the foregoing petition and that in my opinion it is well-founded and entitled to favorable consideration of the court and that it is not filed for the purpose of delay.

Richard S. Kohn
Attorney for the Appellant